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REMARKS

OF

MR. DISNEY, OF OHIO,

UPON THE

NEW HAMPSHIRE CONTESTED ELECTION.

DELIVERED

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NEW HAMPSHIRE CONTESTED ELECTION.

The House having under consideration the report of the Committee of Elections on the contested election from the Third District of New Hampshire—

Mr. DISNEY rose and said: When I obtained the floor on yesterday, it was under an impulse of the moment, for the purpose of uttering some suggestions that on the instant presented themselves to my mind, in reply to remarks which had fallen from gentlemen on the other side; it was for this that I obtained the floor, rather than from any purpose to enter into an elaborate argument in regard to the matter before the House. It was not my purpose then, nor is it my purpose now, to enter into such an argument; but I simply desire to suggest a few things that obviously lie upon the very surface of the pending question, and which, in my judgment, fairly and impartially considered, bear clearly and directly upon the merits of the case. However, before proceeding to them, I may perhaps be permitted to remark, that while listening to the arguments offered by the gentleman from New Hampshire, [Mr. Tuck,] and those offered by the gentleman from Kentucky, [Mr. Thompson,] it seemed to me that I was laboring under some strange illusion—a strange illusion in hearing arguments of that sort—such considerations as growing out of the facts of the case presented by them to be considered in determining a question of this kind. I say, sir, it seemed to me that I was laboring under some strange illusion, to hear considerations of the kind addressed to the House by gentlemen on the other side, as arguments upon which its merits were to be determined. Sir, I could imagine nothing more exquisitely ridiculous than the scene which would be presented if the gentleman from Kentucky [Mr. Thompson] and the gentleman from New Hampshire [Mr. Tuck] would privately offer to my colleagues on that side, the considerations which they have submitted to the House. I say that I could imagine nothing more supremely ridiculous than for those gentlemen to offer, in good faith and with becoming gravity, those considerations to my colleagues on that side of the House. If the gentlemen will do it, and will invite me to be present, I could ask no richer feast. Why, sir, the history of our State teems with instances in which the party to which the gentlemen belong have rendered themselves notorious by their nefarious acts with regard to transactions of this sort—trampling alike upon the Constitution of the State, upon the established law, aye, and, in some cases, even upon a proper sense of public decency itself. My colleagues on that side of the House need no appeal from me to remind them of the course which consistency requires them to take in voting upon a question of this kind, but I ask them to remember the course and practice of their coadjutors in our State—the course even of themselves. Some of the gentlemen who occupy seats upon this floor, I ask to remember their own participation in other Halls of legislation in regard to questions of this kind.

With the gentleman from Pennsylvania, as a practice I condemn the proceeding of the Legislature of New Hampshire. I am opposed to this practice of State Legislatures changing and altering the boundaries of their Representative districts when once established in conformity with the Constitution of the country. But the character of this practice, when considered in relation to the different rights and interests of the various sections of a State, is one consideration, and the law of the land in regard to the relations of a State or her Representatives to the Federal Union, when

submitted to us for judicial decision here as the House of Representatives of that Union, is quite another and different affair. And here, in the outset, permit me to submit one or two considerations with regard to the constitutional relations of this case. The Union was formed by a confederation of States. It was by States assembled in convention that the Constitution was formed. It was by States that that instrument allotted representation to the different portions of the Union, and it is by States that that representation is elected. And when individuals are elected and take their seats upon this floor, they sit here by the spirit and letter of the Constitution as the Representatives of the States from whence they come. Such are the declarations of the law, and such the history of the times shows to have been the intention and object of the framers of our organic law. It is true that by the domestic policy of the States these Representatives are allotted to different portions of these States, and districts have been created; and thus, while by the provisions of the Constitution of the Union each member here is a Representative from the particular State from which he comes, the domestic polity of the States themselves has made them the immediate Representatives of their several districts, and hence every Representative presents himself here in a double aspect and with double relations. On the one hand as the Representative of his State, and on the other as the immediate and direct Representative of the people of the district which sends him here. Gentlemen occupy a double relation, but it is only with one of these relations that we have to deal in the present case. When a vacancy exists in this body there is no vacancy known to the Constitution but a vacancy in the State from which the former Representative came. As regards the domestic regulations of that State, whether they be in conformity with a spirit of fairness as between her people or not, whether her manner of districting is consonant with justice or with right, are questions over which the jurisdiction of Congress does not extend. And here I may be permitted to say, that in my judgment a more arrogant and positive usurpation of power over the rights of the States was never perpetrated by the Congress of this Union than was done by the passage of the act of 1842. The Constitution gave no such power to Congress—the spirit of our institutions belies such authority—and no just or solid argument can be made to sustain it now. We have been told that that act was mandatory, and has been obeyed. This may be so, but in this very case we have evidence that its authority has been denied. For four consecutive subsequent years the State of New Hampshire refused to obey this law; and is there any evidence in the history of the legislative action of that State that she has ever recognized such an authority in Congress? Is not the presumption, from the face of her proceedings, just the other way? That New Hampshire, in districting the State, did it by her own will at her own instance and from considerations of expediency and of her own public policy, having regard only to her own interests and to the rights and interests of her own people, and from no respect to the law of Congress? There is no one at all conversant with her history but knows that in order to induce the people to adopt the Constitution when it was presented for their sanction, the great and leading argument of the day with regard to this particular provision was this, that the defect of the old Confederation, or one of the difficulties arising under it, was, that the Government had no power to execute itself. Experience had shown that some of the States could not and did not elect delegates to represent them in the assembled Congress of the Confederation. The old Government possessed no power to compel the election, and it was to avoid that difficulty, and to prevent negligence of the sort working the ruin and actual dissolution of the Government, that the provision which we now find in our Constitution was inserted. It conferred no power upon the Legislatures of the States. It imposed a duty. It was not inserted to confer power upon the Legislatures, in order to enable them to prescribe the "times, places, and manner" of holding the elections in each particular State, because *ex necessitate* these Legislatures inherently possessed that power. Each State being sovereign, and an independent community, was invested with the law-making power, and, of course, with all the functions necessary to regulate and carry out purposes of that sort. Whether Congress naturally possessed such a power or not, the inherent power of the Legislatures of the States is clear. Suppose an absence of any attempt on the part of Congress to exercise it, and that the Constitution was silent on the point, would any one doubt the power of the Legislatures to make regulations of the kind? For a moment consider these separate States in their original independent capacity without relation to our Confederation as it exists, and I ask, would any man doubt that, as a State, the Legislatures of each of the several States would have the power in themselves to prescribe the time, place, and manner of electing their delegates, their representatives, or whatever the title by which you choose to term them, with power to transact any business in which the State might feel an interest? From

the very necessity of the case, independent of and behind the Constitution, each Legislature of the States possesses the power to prescribe the time, place, and manner of holding all elections within their limits, not only for its own local organization, but for all purposes not prohibited by the Constitution, but connected with the General Government of the Union. This clause of the Constitution confers no power on the State Legislatures, which was not understood to exist without it. As I have said, it was intended not to confer a power, but to impose a duty, and to compel the Legislatures to exercise a power which they inherently possessed. Look at the language: "the times, places, and manner of holding elections for Senators and Representatives *shall* be prescribed," &c.—not optional, but imperative—not shall in the future, but the imperative shall.

The Legislatures of particular States had, under the old Articles of Confederation, neglected to make provision for their representation in Congress. The Constitution intended to compel these Legislatures to remedy this evil. It did not attempt to confer upon them a power which they themselves did not possess. To make assurance doubly sure, and to effectually guard against the evils which they so constantly kept in view when legislating upon this subject, after imposing that duty and making it imperative on the part of the State Legislatures to exercise this power, the framers of the Constitution went on, and, for the purpose of guarding against default, no matter from whatever cause it might arise, they added these words, "that Congress may at any time make or alter such regulations," &c. They imposed a duty, in the first place, upon the State Legislatures to exercise the power which they inherently possess. In the second place, they gave power directly to Congress to exercise it in case of any default on the part of the Legislatures of the States; so that Congress might make the laws which might be rendered necessary by the occasion: the whole object—and there is but one object in the entire paragraph—being to secure at all times to the Congress of the Union a representation from each and every State. Such were the arguments submitted to the people at that day, in order to induce them to support the Constitution, then before them for their approval.

Let any one turn to the writings of Alexander Hamilton, as we find them in the *Federalist*—let him sit down and examine the general history of the times and the arguments which were made to induce the people to adopt the Constitution, and he will find, as I have said, that the sole object of this provision of the Constitution, as then shown, was to guard against that difficulty under the old Government as constituted by the Articles of Confederation, and to secure in any and in every contingency the representation of each State of the Union upon the floor of Congress.

But it is objected that the Legislature cannot alter the boundaries of a district after having once established it. Now, whatever may have been said upon this question—and I admit that a great deal can be said—this is not the tribunal to which such arguments should be addressed. They are arguments against the authority of the several States over their own matters, and it is not for the General Government to intervene between that authority and the rights of the people of the different districts in the State. Will gentlemen deny the right of the Legislature to alter the times of holding elections? I ask the gentleman from Kentucky and the gentleman from New Hampshire, if they controvert the position that the Legislature has the right to alter the day of holding the election or of changing the particular locality—the building in which the votes shall be cast? Can the Legislature alter the time and place, and not alter the manner of holding the election? As was remarked by the gentleman from South Carolina, [Mr. Woodward,] all the power which Congress possesses with regard to this matter, all the power which the State Legislature may possess in regard to it, is precisely equal, whether considered in regard to the times, places, or the manner. And is not the conclusion irresistible, that if the Legislature may alter the times or the places, that it can in like manner and by the same authority alter the manner of holding the elections?

The gentleman from Kentucky, [Mr. Thompson,] in his argument upon this question, endeavored mainly to show that evil consequences would result from a practice of this sort. Now, without attempting to repeat every inconvenience to which that gentleman adverted, let me admit them all to be true. What then? Does the gentleman conclude, that because these inconveniences may result from the exercise of a power to alter the boundaries of districts as once fixed, that therefore such a power does not exist? Was that his argument? If the gentleman will draw a conclusion at all, this inference is strong and unmistakable. The gentleman from Kentucky, I suppose, will admit that all the evils of which he spoke would alike result from the alteration of the boundaries of these districts, whether that alteration was made by the legislative authority of the State or by the legislative authority of Congress. The evils are the result of the alteration, and not of the fact of the alteration being made by any particular authority or power. It would be perfectly immaterial wheth-

er the change of the boundaries was made by the authority of the Legislature of the State, or by the authority of Congress. In either case these consequences would ensue, and, according to the doctrine of the gentleman, the power therefore would not exist. But, unfortunately for this argument, the Constitution says that Congress may not only make but may alter such regulations. Here there is a power distinctly conferred upon Congress to make those very alterations, from the existence of which the gentleman from Kentucky argued that the power could not exist. The general argument of the gentleman, that an abuse of power is evidence of its non-existence, is illogical. He might say that where the exercise of a power *necessarily* involved an abuse, it might be an argument against the existence of that power; but to say that because a power *may* be abused, and therefore it does not exist, is an argument levelled at once at the existence of government itself. All the power and authority exercised by any Government on earth may be abused; but will the gentleman from Kentucky [Mr. Thompson] therefore conclude that there is no power, no authority in Government itself? No, sir, the argument is untenable, and the abuses which may grow out of the alteration of this district by the interposition of legislative authority, is no argument against the existence of the power and authority of the Legislature to exert it.

The gentleman puts many imaginary and hypothetical cases, and among others, that they might so district the State as to render it impossible to know in what particular part a vacancy could be filled. To this the gentleman from Pennsylvania [Mr. Strong] gave a very apt, appropriate, and, in my judgment, satisfactory reply—for the result of such a state of affairs would simply be that no election could be held.

But, sir, there is no such difficulty existing in this case. Why will the gentleman run after imaginary cases when we have a real case before us for decision? We are not called upon to decide in a case of that sort. We are called upon to decide in a case where no issue is made with regard to the identity of the district. It is admitted that the only alteration in it, is the addition of two or three towns or townships. According to the argument on the other side, the actual, identical, particular persons alone who elected the former representative, are now to fill the vacancy. Why, sir, the idea is absurd; the thing is impossible. Men die; they change their residences; some go out of the district, others come into it; and the idea of the actual, specific population that returned General Wilson being called upon to elect his successor, is, I repeat it, an absurdity, and an impossibility. All that can be required in a case of this sort is, that the voters shall be substantially the same.

Why, there is hardly anything in human nature that is not undergoing a change. There is hardly anything that remains specifically the same. Writers tell us that the human system physically undergoes it daily and hourly.

It is sufficient for the purposes of Government, sufficient for the rights of all parties concerned, that it should be substantially the same district. That it is so in the present case, is undenied.

I may remark, that whatever may be the weight which my judgment gives it, I have been quite amused with the novelty of one suggestion. It is suggested that by some sort of mysterious principle, the people in an original district where a vacancy has occurred from necessity, possess the right to fill the vacancy created, though the law by which the district was established may have been repealed. And the fact that the present members from New Hampshire hold their seats is cited to prove that the original districting law has obligations left. Why, sir, the present members of the State of New Hampshire hold their seats by virtue of a right vested in them by the act in operation at the time of their election. The people of these two particular counties composing the district that General Wilson represented, have no inherent right to elect a member to sit upon this floor. Let me repeat, the people of these particular counties, which originally formed the district, possessed no natural and inherent right to elect a member of Congress. This right to elect a Representative grew out of the provisions of the district act. Their right grew out of that law, and when it was repealed their right died with it.

If I authorize an agent to make a contract for me, and I revoke his authority, I do not thereby destroy the rights of the other contracting party. Suppose my agent, upon my authority, makes a contract, my subsequent revocation does not interfere with the right of the parties contracting; but if from any cause the other contracting party, subsequent to my revocation of authority in my agent, failed to fulfill that contract, would my agent, in despite of that revocation, have the right to contract with another party to carry out the original contract? Surely not. A principle similar to this is involved in the case before the House. The different districts of New Hampshire were entitled, by the law of 1842, to send Representatives to this Congress. They did send them, and the rights of the members sent can not be contravened by any subsequent enactment. But the law creating these particular districts having been repealed, the right

of any of these districts to elect a member died with the law, and the election of a new member must be governed by the law in existence at the time—the law which, like the one repealed, marked out and defined the limits, and gave the right of the district to elect.

As I have said, it was the right of these particular counties forming this district which General Wilson represented, to reëlect a representative, and that right was not and could not be interfered with by the passage of this law of 1850. So far as the old law of 1846 gave rights to the parties who elected General Wilson, they exercised them, and the new law, by which the districts have been changed, has not and could not divest either General Wilson or his colleagues of the rights they had secured.

But, sir, I will content myself with occupying the attention of the House but little longer upon this matter; I will, however, urge that which I think must be held to be conclusive in the investigation of this question. However, as an original question, the arguments may run, the usage of the country has settled the law of the case. We are told that there are some fifteen or twenty gentlemen now on this floor, occupying these seats by the same right as that by which the gentleman whose right is contested. In my own State there are districts represented by gentlemen here whose districts have been altered since they were first established.

As regards the objection that the people in these towns voted for two different Representatives, I should be surprised if gentlemen should rely upon such a fact in the face of the law and every-day usage of Virginia. There the voter is entitled to vote in just as many counties as he may own land. There are gentlemen here who have been elected by such votes. Such is the law of Virginia. The argument appears to me too weak to render it necessary to give it more attention.

The discussion of the points involved might be protracted to almost an immeasurable length; but I fall back, independent of every other consideration, upon the general proposition, that usage has recognized and sanctioned the right set up by the sitting member in this case. The usage of the different States has settled this entire question. When a vacancy happens in any State, it must be filled in conformity with the existing law, unless the law shall be repugnant to the Constitution and laws of the United States. In the determination of this question, I apprehend there can be but a single opinion. The rights and authority of the State are clear. I am satisfied that no gentleman upon any side of the House, who will sit down and carefully, calmly, and impartially review the considerations which I have thus attempted hastily to submit, can doubt for a moment—in view of the abstract law of the case, the provision of the Constitution, and the usage of the country—that the right to the seat is in the present sitting member from New Hampshire.